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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. HAMEED JAMAL BROWN, Defendant and Appellant.	C058784 (Super. Ct. No. 04F06434)

A jury found defendant guilty of two counts of residential burglary and one count of rape perpetrated during the commission of a burglary. Thereafter, the trial court found true allegations defendant had two prior Arizona convictions that qualified as strikes under California law and sentenced him to prison for a term of 100 years to life.

Defendant appeals his convictions, arguing the court erred in failing to give a limiting instruction sua sponte that "cross-admissible" evidence related to jointly tried offenses may be considered solely on the issue of intent (Evid. Code, § 1101); alternatively, he argues his attorney was ineffective

for failing to request such a limiting instruction. Defendant also contends the court erred in finding that his Arizona convictions constituted strikes under California law. None of these contentions has merit. We shall affirm the judgment.

FACTS

We recite the pertinent facts in the light most favorable to the judgment, drawing all reasonable inferences in support thereof. (*People v. Bogle* (1995) 41 Cal.App.4th 770, 775.)

On June 3, 2004, the Saladanas discovered that the front window to their upstairs apartment on Mack Road had been broken and that cash, jewelry, beer, and food were missing.

Investigating officers found two latent fingerprints on the sliding portion of the front window which, before the burglary, had been covered by a screen. One of the fingerprints from the Saladana window later proved to have more than 15 points of identification in common with defendant.

This event formed the basis for the charge of residential burglary in count one. The jury found defendant guilty of the Saladana burglary.

In November 2004, M. G. heard a knock on her front door at the Tamaron Ranch Apartments and saw a man through the peep hole who demanded to be let in. She did not open the door, and about an hour later, when she saw the man trying to break open her front window, she called 911.

The following morning, M. G. saw the same man again, this time sitting on a plastic patio chair taken from the neighbor's patio; he had pried back the screen from her front window and

was trying to pry the window open. Again, she called the police.

Three weeks later, a police technician processed M. G.'s apartment around the window area for fingerprints and found none. He did find fingerprints that matched defendant's on one of the plastic patio chairs from M. G.'s neighbor's patio. M. G. identified defendant at trial as the man she saw trying to break into her apartment.

These events formed the basis for the charges of residential burglary in count two. The jury found defendant not guilty of burglarizing M. G.'s apartment.

M. T. lived in the same apartment complex as M. G. During the night of December 13, 2004, defendant broke into M. T.'s apartment bedroom and woke her by pressing a pillow over her head, which remained on her face throughout the assault. He threatened her, kissed her breasts, and had intercourse with her, using a condom. After the attack, M. T. noticed that her cell phone, identification, and money were missing from her purse. Evidence obtained from a saliva swab of M. T.'s breast matched defendant's DNA profile.

These events formed the basis for the charges of residential burglary and rape in counts three and four, as to which it was also alleged that the rape was perpetrated during the commission of a burglary, committed with the intent to commit rape. The jury found defendant guilty on both counts involving M. T., and found true the allegations he raped M. T.

during the course of a burglary, which burglary was committed with the intent to commit rape.

Additional facts appear as necessary to a resolution of the contentions on appeal.

DISCUSSION

I

Cross-Admissibility Of Evidence

Evidence Code section 1101, subdivision (a) bars introduction of evidence of a person's character trait "when offered to prove his or her conduct on a specified occasion." But Evidence Code section 1101, subdivision (b) permits introduction of evidence "that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, . . .) other than his or her disposition to commit such an act."

Before trial began, defendant moved to sever on the ground that evidence of the separate counts would not otherwise be cross-admissible under Evidence Code section 1101, because the three incidents were not sufficiently similar to be admissible to prove intent, identity, or the existence of a common plan or scheme. The court denied the motion to sever, but "invite[d] [defense counsel] to craft or modify a CALCRIM jury admonishment. And if you like, I can -- remind me and I can do that in the course of the evidence. I will certainly do it in the course of the instructions." Defense counsel never proposed an instruction on the use of cross-admissible evidence.

When, as here, evidence is admissible for one purpose and inadmissible for another purpose, "the court *upon request* shall restrict the evidence to its proper scope and instruct the jury accordingly." (Evid. Code, § 355, italics added.) Thus, although a court should give a limiting instruction on request, it has no sua sponte duty to give one. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051.)

The Supreme Court in *People v. Collie* (1981) 30 Cal.3d 43, 64 recognized that a court may nonetheless have a duty to provide a limiting instruction in the "occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose." (*Ibid.*; see also *People v. Farnam* (2002) 28 Cal.4th 107, 163–164.) This is not such an extraordinary case. Nor did the discussion of whether to sever trial of the various counts, conducted before the evidence portion of the trial, constitute an adequate request for a limiting instruction, as defendant suggests. (See *People v. Hernandez*, *supra*, 33 Cal.4th at pp. 1052-1053.)

In sum, the trial court had no duty to give a limiting instruction on the jury's consideration of evidence offered to prove one charged crime for the purpose of proving his intent or identity as the perpetrator of another charged crime, except on request. Because defendant did not request a limiting instruction at the appropriate time, the court had no sua sponte duty to give one.

Alternatively, defendant contends his counsel was ineffective in not requesting a limiting instruction. "To establish ineffective assistance, defendant bears the burden of showing, first, that counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms. Second, a defendant must establish that, absent counsel's error, it is reasonably probable that the verdict would have been more favorable to him." (*People v. Hawkins* (1995) 10 Cal.4th 920, 940.) "If the record does not shed light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for and failed to provide a satisfactory explanation, or there simply can be no satisfactory explanation." (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

On this record, we cannot say that counsel was deficient for not requesting a limiting instruction. "A reasonable attorney may have tactically concluded that the risk of a limiting instruction . . . outweighed the questionable benefits such instruction would provide." (*People v. Maury* (2003) 30 Cal.4th 342, 394; see also *People v. Hawkins*, *supra*, 10 Cal.4th at p. 942.)

And, even were we to conclude defense counsel erred, defendant cannot demonstrate that it is reasonably probable that the verdict would have been more favorable to him. (Cf. *People v. Hawkins*, *supra*, 10 Cal.4th at p. 940.) Defendant was acquitted of burglary in connection with the M. G. incident, and evidence of his guilt was strong on the other three counts

arising from the remaining two incidents, i.e., the Saladana burglary and the burglary and rape of M. T. Moreover, defendant's convictions of these crimes did not depend on cross-admissible evidence; rather, separate forensic evidence linked defendant to each. His fingerprint was found on that part of the Saladana's front window that was ordinarily covered by a screen and only exposed during the burglary, and he left his DNA on M. T.'s breast.

Defendant has failed to prove ineffective assistance of counsel.

II

Arizona Convictions

Defendant also contends the trial court erred in sentencing him under the three strikes law because his Arizona convictions do not qualify as strikes.

Following the entry of the jury verdict, bifurcated proceedings were held regarding the prior conviction allegations. The People alleged defendant had been convicted in Arizona during October 1998, in separate cases, of the crimes of aggravated assault (Ariz. Rev. Stat. §§ 13-1203, 13-1204) and attempted aggravated robbery (Ariz. Rev. Stat. §§ 13-1902, 13-1903). It further alleged that defendant's Arizona convictions represented serious felonies within the three strikes provisions of California law.

Defendant argued in those proceedings that there was insufficient foundation to identify him as the person convicted of the Arizona crimes, and that the "least adjudicated elements"

of assault under Arizona law would not be grounds for an assault conviction under California law. The court took the matter under submission and ultimately found beyond a reasonable doubt that defendant is the person convicted of both Arizona felonies, and that those convictions were for "for offenses which would be serious felonies if suffered in California."

On appeal, defendant argues that neither the aggravated assault nor the attempted aggravated robbery convictions would have been strikes in California under the "least adjudicated elements" test, which focuses on whether the elements of the foreign crime, as defined by that jurisdiction's statutory or common law, include all of the elements of the California felony. (See *People v. Crowson* (1983) 33 Cal.3d 623, 633-634.)

A prior conviction from another jurisdiction constitutes a strike if it is "an offense that includes all of the elements of the particular felony as defined under California law . . . ." (Pen. Code, § 667.5, subd. (f); *People v. Riel* (2000) 22 Cal.4th 1153, 1203.) Thus, to constitute a strike, the prior foreign conviction "must involve *conduct* that would qualify as a serious [or violent] felony in California." (*People v. Avery* (2002) 27 Cal.4th 49, 53, italics added.)

In making this determination, the trial court may consider the entire record of that conviction, including evidence of defendant's conduct in committing the offense. (*People v. Riel*, *supra*, 22 Cal.4th at pp. 1204-1205; *People v. Myers* (1993) 5 Cal.4th 1193, 1195 [Pen. Code, § 667, subd. (a)]; *People v. Jones* (1999) 75 Cal.App.4th 616, 632 [three strikes law].)

Defendant relies on the former rule that the trial court may consider only the "least adjudicated elements of the prior conviction" under the law of the foreign jurisdiction (*People v. Crowson*, *supra*, 33 Cal.3d at p. 634, italics omitted); that is no longer the law in California (*People v. Riel*, *supra*, 22 Cal.4th at p. 1205).

Here, the record of defendant's Arizona convictions included a certified transcript of the 1998 Arizona hearing at which defendant pled guilty to both the aggravated assault and attempted aggravated robbery convictions. In that transcript, defendant describes the factual basis -- i.e., the conduct -- justifying his guilty pleas to both charges.

As to the aggravated assault charge, defendant admitted when he pled guilty that he "[e]ntered [the victim's] house with a weapon, threatened her and used force towards her"; the weapon he used was a loaded nine-millimeter handgun; and he "place[d] her in reasonable apprehension of being physically injured." Defendant told the court the victim was an acquaintance with whom he had argued because she had spread rumors about him.

In view of the record of defendant's conduct in the commission of the Arizona aggravated assault, we reject his argument on appeal that this conviction cannot constitute a strike in California because the language of the applicable Arizona statute describes a number of "aggravated assaults" which do not fall within the California definition of a strike, such as actions which constitute "mere menace" or "mere 'touching' with some intent to 'insult.'" Penal Code

section 1192.7, subdivision (c)(8) lists as a serious felony, i.e., a strike, "any felony in which the defendant personally uses a firearm." When he entered his guilty plea to the Arizona aggravated assault charge, he admitted having personally pointed a loaded handgun at the victim. The trial court here properly concluded that, had defendant committed that conduct in California, he would have been subject to punishment for assault as a strike. (Cf. *People v. Laino*, *supra*, 32 Cal.4th at p. 898; see also *People v. Ruiz* (1999) 69 Cal.App.4th 1085, 1089.)

As to the attempted aggravated robbery charge, defendant admitted when he pled guilty to that crime in Arizona that, in attempting to take property, he entered the victim's "vehicle to take money that she had with force," after he and a confederate saw the victim cash her paycheck. They approached her as she returned to her car, preventing her from closing the car door, and defendant reached into the car and tried to take her money and wallet. Defendant threatened the victim, and his confederate prevented her from driving away by blocking her path with his car.

In view of his conduct, we likewise reject defendant's contention that this conviction cannot constitute a strike in California because "the Arizona crime of 'attempt' [is] distinctly broader than that which exists in California." Robbery is listed as a serious felony under the three strikes statute, as is "any attempt" to commit a robbery. (Pen. Code, § 1192.7, subd. (c)(19), (39).) The trial court properly concluded that defendant's conduct in trying to steal the

victim's wallet and money as she returned to her car from the check cashing facility would have subjected him to punishment for attempted robbery as a strike in California.

There was no error.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

SCOTLAND, P. J.

NICHOLSON, J.